NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN KENNY DiLORETO, Petitioner,	:	Civil Action No. 05-2347 (DMC)
v.	:	**OPINION**
ADMINISTRATOR RONALD H. CATHEL, et al., Respondents.	:	

APPEARANCES:

Petitioner pro se
John Kenny DiLoreto
New Jersey State Prison
P.O. Box 861
Trenton, NJ 08625

Counsel for Respondents
Paula Cristina Jordao
Morris Co. Prosecutor's Ofc.
Administration & Records Bldg.
Morristown, NJ 07963

CAVANAUGH, District Judge

Petitioner John Kenny DiLoreto, a prisoner currently confined at New Jersey State Prison in Trenton, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents are Administrator Ronald H. Cathel and the Attorney General of the State of New Jersey.

For the reasons stated herein, the Petition must be denied.

I. BACKGROUND

A. Factual Background

The relevant facts are set forth in the opinion of the Supreme Court of New Jersey.[1]

> We derive our summary of facts largely from testimony presented at a suppression hearing conducted by the trial court. On March 19, 1998, defendant's brother reported defendant as a missing person to the police department in Jefferson Township, Morris County. The police, in turn, reported defendant's name to the [National Crime Information Center ("NCIC")], which houses a national network of information authorized by Congress and made available to federal and local criminal justice agencies. See 28 U.S.C. § 534.
>
> In their initial report to the NCIC, the police considered defendant to be "a missing person with involuntary status." That designation was changed after a detective from the county prosecutor's office reviewed it and determined that defendant's status should have been denominated as "endangered." The detective testified at the suppression hearing:
>
> > Endangered is the catch-all phrase that the local police departments and the State Police use regarding adult missing persons. The most important thing [is] to get a missing person into the system as missing and if they don't fit any of the other criteria, meaning disability, a catastrophic victim, or a kidnapping, we put them in under the endangered [status].
>
> On March 21, 1998, two days after his initial call, defendant's brother again telephoned the police

---

[1] Pursuant to 28 U.S.C. § 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

to inform them that defendant was no longer missing. In response, an officer attempted to remove defendant's name from the NCIC's computer database. The officer did not succeed in that effort apparently because he had entered "John K. Diloreto" into the computer rather than the exact name contained in the database, "John Kenny Diloreto." Because the NCIC's computer system rejected the attempts to cancel the Diloreto alert, defendant's name remained in the system during the period relevant to this appeal.

On April 8, 1998, at about 10:30 p.m., a police officer in Fairfield, Essex County, was on patrol in a marked police car. He spotted a vehicle in the parking lot of a hotel facing U.S. Highway 46. According to the officer, the car attracted his attention because it was parked at an angle between two other vehicles, exhaust was emanating from its tailpipe, and its windows were fogged. He also knew of reports from that location of automobile thefts and attempted suicides.

The officer ran a check of the car's license plate number using a mobile data terminal (MDT). There was a positive retrieval of data, known as a "hit," which revealed that the vehicle's last user was listed as an endangered missing person. The data also provided identifying information as well as the agency that had reported the person missing. The MDT's buzzer sounded as an alarm to the officer that the foregoing information had been retrieved. ...

After receiving the NCIC alert, the officer called for assistance. He also noticed that the tailpipe of the parked vehicle was no longer emitting fumes and concluded "[t]hat the engine had been shut off." A second officer arrived a few minutes later.

After that arrival, the first officer approached the parked car and shone his flashlight into it. The officer testified that, without the aid of a flashlight, he "couldn't see inside the car because of the condition of its [fogged] windows[.]" He saw that a man, defendant, was inside and appeared to be asleep, leaning back with his head against the vehicle's frame or seat. The officer attempted to open the car door, but it was locked. He knocked on the car window, seemingly awakening defendant. After defendant rolled down his window, the officer asked for identification.

Defendant produced a driver's license and social security card, which matched the name of the missing person.

The officer returned to his police car. He radioed his headquarters, requesting that a call be made to the police in Jefferson Township to "verify the hit." Again, the officer explained:

> Q Why do you do that, verify the hit?
>
> A To validate it, make sure that in cases of criminal wants that you're not arresting the wrong person, <u>but in this case it would be a welfare check to ensure the welfare and well-being of the individual named in the want.</u>
>
> Q What is your understanding of the characterization of missing? When you get that over your MDT what does that convey to you? What did it convey to you in this particular situation?
>
> A Missing person is somebody that was reported by concerned individuals as to have been missing, not being seen, an unaccounted whereabouts.
>
> Q Now I think you've already answered this, but how did you attempt to verify that information from Jefferson?
>
> A I requested police headquarters to contact Jefferson Police Department initially [] by telephone, again, to verify the missing person want. Then as a matter of departmental procedure a computer teletype is also sent to that agency requesting hit confirmation.
>
> Q And you did this from your patrol vehicle?
>
> A Yes, sir.
>
> [Emphasis added by Supreme Court of New Jersey.]

After the first officer left the driver's side of defendant's car to confirm the missing person's report, the second officer began speaking with defendant. In response to the officer's question, defendant stated that he did not know that he had been reported missing. Defendant also indicated that he did not know why someone would report him missing. Asked by the officer to state his itinerary, defendant indicated that he had traveled from Jefferson Township and was headed to his father's home in Paterson. When asked why he had pulled into the hotel's parking lot, defendant stated that he was tired and wanted to sleep.

While the second officer conversed with defendant, the first officer returned to the vehicle and stated that he intended to place defendant in the officer's police vehicle while they awaited the confirming information from the Jefferson Township police. At that time, it was raining. The first officer testified that he had decided to "secure [defendant] in the back of the patrol car until Jefferson ... [got] back to us one way or the other, whether or not he's actually wanted or not." Later in his direct examination, the officer reiterated his intention in placing defendant in the police car:

> Q I want to go back to the point at which you decided to place [defendant] in the back of the patrol car. And my question is what did you intend to do after placing him there, what process were you intending to go through?
>
> A Simple verification through Jefferson Township to check on the welfare of the individual, find out why he was in the computer as a missing person, not only missing, but missing endangered with the classification of being endangered. Again, it was simply a welfare check and at this point to decide to put him in the rear of the squad car was for reasons of officer safety as well as safety to the individual.

The second officer corroborated that testimony, explaining, "[w]e determined that it would be best to have the driver exit his vehicle and be brought back to

the patrol vehicle until the situation could be sorted out."

The second officer also testified that "for officer's safety as well as [defendant's] own safety I asked him to turn towards the vehicle so I could pat him down." As the officer patted down defendant's front pocket, he felt what he believed was a "large metal object[.]" According to the officer, he asked defendant to identify the object and defendant stated, "I don't know, sir." The officer indicated that the item "ran almost the length of the pocket and it felt like a very hard metal type object in the pocket." As he began to remove the item from the pocket, the officer again asked defendant to identify it. Defendant stated that it was "a clip." The officer understood that response to mean "an ammunition magazine for a handgun or any type of ammunition magazine."

After the officer removed the object and observed that it was an ammunition clip, he determined "for [his] safety as well as ... [the other officer's] safety," that they should handcuff defendant until the pat-down search was completed. Accordingly, the first officer placed handcuffs on defendant and completed the search. The police found no other objects on defendant. After examining the clip, the second officer determined that it contained bullets.

The second officer asked defendant to reveal the location of the gun that was associated with the ammunition clip. Defendant replied that it would be found under his car's front seat. The officer then retrieved a 9mm semi-automatic handgun from that location. The gun was loaded with an ammunition clip and a bullet inside its chamber. Thus, in addition to the gun, the officers found two ammunition clips, one in defendant's pocket and the other in the gun itself.

The officers transported defendant to police headquarters and subsequently learned that the NCIC report was in error. The gun later was identified as the weapon used in a robbery and murder that had occurred at a gas station earlier on April 8, 1998, in Pequannock, Morris County. The police informed defendant of his rights as required under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

> (1966). After waiving those rights, defendant incriminated himself in a taped statement. Fingerprints found at the gas station and other evidence also connected defendant to the crimes.

State v. DiLoreto, 180 N.J. 264, 269-74 (N.J. 2004).

B. Procedural History

A grand jury indicted Petitioner for purposeful or knowing murder, N.J.S.A. 2C:11-3a(1) or (2), armed robbery, N.J.S.A. 2C:15-1a (two counts), possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, and felony murder, N.J.S.A. 2C:11-3a(3). The case proceeded as a capital case.

Petitioner made a pre-trial motion to suppress the gun, ammunition, and statements to police, which the trial court denied. Petitioner subsequently pleaded guilty to all counts. The sentencing jury could not reach a unanimous agreement as to the penalty. Accordingly, Petitioner was sentenced to an aggregate term of life imprisonment plus a consecutive term of 20 years imprisonment with 83-3/4 years parole ineligibility, under the No Early Release Act ("NERA:), N.J.S.A. 2C:43-7.2.

Petitioner appealed, challenging the denial of his motions to suppress and the sentence, challenging application of the NERA and consecutive sentences. The Appellate Division remanded for resentencing on the NERA claim, but otherwise affirmed. State v. DiLoreto, 362 N.J. Super. 600 (App. Div. 2003).

Petitioner appealed to the New Jersey Supreme Court, which denied certification as to the consecutive sentence question, but

which addressed and affirmed on the suppression issues. State v. DiLoreto, 180 N.J. 264 (2004).

This Petition followed. Respondents have answered on the merits and this matter is now ready for disposition.

II. 28 U.S.C. § 2254

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 now provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> With respect to any claim adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determinated by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially

indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve[s] an unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and may involve an "unreasonable application" of federal law "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," (although the Supreme Court expressly declined to decide the latter). Id. at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. Id. at 409. In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. Matteo v. Superintendent, 171 F.3d 877, 890 (3d Cir. 1999).

Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference. Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002) (citing Weeks v. Angelone, 528 U.S. 225, 237 (2000)). With respect to claims

presented to, but unadjudicated by, the state courts, however, a federal court may exercise pre-AEDPA independent judgment. See Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001); Purnell v. Hendricks, 2000 WL 1523144, *6 n.4 (D.N.J. 2000). See also Schoenberger v. Russell, 290 F.3d 831, 842 (6th Cir. 2002) (Moore, J., concurring) (and cases discussed therein).

The deference required by § 2254(d) applies without regard to whether the state court cites to Supreme Court or other federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v. Packer, 537 U.S. 3 (2002); Woodford v. Visciotti, 537 U.S. 19 (2002)).

Although a petition for writ of habeas corpus may not be granted if the Petitioner has failed to exhaust his remedies in state court, a petition may be denied on the merits notwithstanding the petitioner's failure to exhaust his state court remedies. See 28 U.S.C. § 2254(b)(2); Lambert v. Blackwell, 387 F.3d 210, 260 n.42 (3d Cir. 2004); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003).

Finally, a pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S.

519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).]

III. ANALYSIS

A. Fourth Amendment Claims

Petitioner contends that the officers violated his right, under the Fourth Amendment, to be free from unreasonable searches and seizures when they (1) ordered him to step out of his vehicle, (2) performed a pat-down search, (3) reached into his pocket to retrieve the metal object that could be felt during the pat-down search, and (4) handcuffed and questioned him about the whereabouts of the gun without first advising him of his constitutional rights.

The Supreme Court of New Jersey considered and rejected these claims. In a carefully reasoned opinion, the Supreme Court of New Jersey determined that the actions of the officers were justified under the "community caretaking" and "exigent circumstances" exceptions to the warrant requirement of the Fourth Amendment. State v. DiLoreto, 180 N.J. at 274-83.

The Fourth Amendment to the U.S. Constitution, made applicable to the states through the Due Process Clause of the

Fourteenth Amendment, see Mapp v. Ohio, 367 U.S. 643 (1961), provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV. Generally, speaking, evidence gained from a Fourth Amendment violation may not be used against a defendant at trial. See Mapp v. Ohio, 367 U.S. at 654-55; Weeks v. United States, 232 U.S. 383, 391-93 (1914).

> In Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court examined the nature of the exclusionary rule, which it characterized as a "judicially created means of effectuating the rights secured by the Fourth Amendment" and balanced its utility as a deterrent against the risk of excluding trustworthy evidence and thus "deflect[ing] the truthfinding process." Id. at 482, 490, 96 S.Ct. 3037. Find that, as to collateral review, the costs of the exclusionary rule outweighed the benefits of its application the Court concluded that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. at 494, 96 S.Ct. 3037. While the federal courts are not thus deprived of jurisdiction to hear the claim, they are -- for prudential reasons -- restricted in their application of the exclusionary rule. Id. at 494 n. 37, 96 S.Ct. 3037.

Marshall v. Hendricks, 307 F.3d 36, 81-82 (3d Cir. 2002). "An erroneous or summary resolution by a state court of a Fourth

Amendment claim does not overcome the bar." Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986).

The Court of Appeals for the Third Circuit has recognized that there may be instances in which a full and fair opportunity to litigate was denied in state court. See, e.g., Gilmore v. Marks, 799 F.2d at 57 (observing that a state's "failure to give at least colorable application of the correct Fourth Amendment constitutional standard" might amount to a denial of the opportunity for full and fair litigation); Boyd v. Mintz, 631 F.2d 247, 250 (3d Cir. 1980) (assuming, without deciding, that "opportunity" simply means providing procedures by which one can litigate a Fourth Amendment claim, Stone v. Powell does not preclude federal habeas relief when "'the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process'" (quoting Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977), cert. denied, 434 U.S. 1038 (1978))).

This case does not present one of those instances. Petitioner was provided a pre-trial suppression hearing, and two levels of appeal from the denial of his suppression motion. The Supreme Court of New Jersey carefully reviewed the development of applicable Fourth Amendment caselaw and applied it to the facts of Petitioner's case. 850 A.2d at 274-282. Petitioner has been afforded a full and fair opportunity in the New Jersey court

system to litigate his Fourth Amendment claim. Accordingly, this Court cannot grant Petitioner habeas relief on this claim.

B. Fifth Amendment Claims

Petitioner contends that the officers violated his rights under the Fifth Amendment when they questioned him about the whereabouts of a handgun without first advising him of his constitutional rights.

The Supreme Court of New Jersey adopted the holding of the Appellate Division rejecting this claim.

> "Nor is suppression of the gun required because the police asked defendant where the gun was located. Particularly in these circumstances in which defendant had not been arrested for a crime, the limited inquiry could be made in the interests of public safety."

State v. DiLoreto, 180 N.J. at 282 (quoting State v. DiLoreto, 362 N.J. Super. 600, 628 (App. Div. 2003) (citing, inter alia, New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (other citations omitted))).

Pursuant to the Fifth Amendment to the United States Constitution, "No person ... shall be compelled in any criminal case to be a witness against himself ... ." In Miranda v. Arizona, the Supreme Court of the United States held that:

> when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be

> scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-79 (footnote omitted). Thus, Miranda warnings exist to protect a defendant's Fifth Amendment rights to remain silent and to the assistance of an attorney during custodial interrogation.

The Supreme Court has recognized, however, that there are situations "where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in Miranda." New York v. Quarles, 467 U.S. 649, 653 (1984) (footnote omitted). In Quarles, police officers were approached by a woman who reported that she had just been raped, described the offender, and reported further that he was carrying a gun and had just entered a nearby supermarket. One of the officers apprehended the suspect, frisked him, and discovered that he was wearing a shoulder holster which was then empty. After handcuffing the suspect, the officer asked him where the gun was. The suspect nodded and responded, "the gun is over

there." After retrieving the gun, the officer formally placed the suspect under arrest and read him his Miranda rights from a printed card. There was no suggestion of actual coercion in obtaining the suspect's statement.

In holding admissible the suspect's statement, "the gun is over there," the Court declined to impose a "good faith" requirement.

> In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives -- their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.
>
> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. ...
>
> ...
>
> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. ...
>
> In recognizing a narrow exception to the Miranda rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our

> Miranda holding. ... As we have in other contexts, we recognize here the importance of a workable rule "to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." ... But as we have pointed out, we believe that the exception which we recognize today lessens the necessity of that on-the-scene balancing process. The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.

Quarles, 467 U.S. at 656-59 (citations and footnotes omitted). Upon recognizing the "public safety" exception, the Court also noted that it was error to exclude the suspect's subsequent statements as illegal fruits of a Miranda violation. Quarles, 467 U.S. at 660.

The decision of the Supreme Court of New Jersey that Petitioner's statements to police were admissible under the "public safety" exception to the Miranda rule is neither contrary to nor an unreasonable application of clearly-established federal law. Cf. United States v. Johnson, 95 Fed.Appx. 448 (3d Cir. 2004) (unpubl.). Nor is it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to relief on this claim.

C. Sixth Amendment Claim

Petitioner contends that the officers violated his right to counsel under the Sixth Amendment when they questioned him about

the whereabouts of a gun without first advising him of his constitutional rights.[2]

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The Sixth Amendment right to counsel "is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (citations and internal quotation marks omitted).

Here, the officer's question to Petitioner about his gun, took place before any prosecution was commenced. Thus, there was no violation of Petitioner's Sixth Amendment right to counsel. Petitioner is not entitled to relief on this claim.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254.

---

[2] Petitioner raised this claim before the Appellate Division but does not appear to have raised it before the Supreme Court of New Jersey. Respondents do not assert that the claim is unexhausted. Because the claim is patently meritless, this Court will exercise its authority to deny relief. See 28 U.S.C. § 2254(b)(2).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. No certificate of appealability shall issue.

V. CONCLUSION

For the reasons set forth above, the Petition must be denied. An appropriate order follows.

S/ Dennis M. Cavanaugh
Dennis M. Cavanaugh
United States District Judge

Dated: 7/6/06